Supreme Court, U.S.
FILED
FEB 7 2000
CLERK

No. 99-969

IN THE

Supreme Court of the United States

MISTICK PBT,

Petitioner,

v.

HOUSING AUTHORITY OF
THE CITY OF PITTSBURGH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR HOUSING AUTHORITY PARTY RESPONDENTS

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COUNTERSTATEMENT OF THE CASE

This *qui tam* action is the second attempt by Mistick PBT (Mistick), a general contractor, to recover from the Housing Authority of the City of Pittsburgh (HACP) in connection with the change in specifications for lead based paint abatement at two residential housing projects known as the Bedford and Addison projects. The District Court thwarted that attempt when it granted the motions to dismiss based upon the jurisdictional bar in the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

The first action was commenced on July 16, 1991 by the filing of a complaint against HACP in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. G.D. 91-12543. That complaint sought damages for delay resulting from the change in specifications for encapsulating the lead based paint at the Bedford and Addison projects. During that action, Mistick discovered evidence which allegedly substantiated claims for fraud against HACP and its architects in connection with the specification for the lead-based paint abatement and, thus, Mistick sought leave to amend its state court complaint to include claims against the architects for fraud.[1] The state court denied that motion on December 6, 1994, and, in doing so, it ruled that Mistick's allegations showed nothing more than purported negligence

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1. The representations made by Mistick to the state court regarding the source of its knowledge (discovery) and the time of its acquisition (August to October 1994) contradicted those subsequently made by Mistick to the District Court. Affidavits filed in the District Court alleged that Mistick knew of the fraud since October 1993 and that it acquired its knowledge, in part, from documents obtained pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (FOIA).

in preparing the specifications. Thereafter, Mistick and HACP negotiated a settlement. In the settlement agreement and release, signed on August 1, 1996, Mistick agreed, in consideration of a substantial payment by HACP, to release HACP and its employees from:

> any and all causes of action, claims and/or demands for damages, losses, costs, expenses, compensation, proceeds, fees and/or monies, known and unknown, which Mistick PBT has made, claims to have and/or may hereafter have or claim to have . . . , including particularly, without limitation, any and all sums owed or claimed to be owed to Mistick PBT for losses or damages incurred or claimed to have been incurred by Mistick PBT arising from the performance of the Bedford Dwellings remodeling and reconstruction contract . . . and/ or the performance of the Addison Terrace remodeling and reconstruction contract.

The state court action was marked settled and discontinued on August 5, 1996.

Unbeknownst to HACP, Mistick commenced the second action, in the District Court, on November 20, 1995. That action was brought under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, and, in compliance with that act, the complaint was kept under seal and it was not immediately served upon the defendants. On July 8, 1996, the United States filed its notice of election to decline intervention. The next day, the District Court lifted the seal on the complaint and certain other items and it directed Mistick to serve the complaint and various other documents. Mistick did not

request the issuance of summonses until August 6, 1996, *the day after the state court action was marked settled and discontinued*. It made service on all parties except Mr. Washington shortly thereafter.

The *qui tam* complaint — kept under wraps while the state court case was winding down to settlement — avers that HACP parties[2] and the architectural parties defrauded the federal government by making false representations regarding the suitability of a particular product, Glid Wall, as an encapsulant for the lead based paint and the reasons for the change to another product, Zomat, for the actual lead-based paint abatement undertaken by Mistick at the federally-funded Bedford and Addison projects.

The respondents filed motions to dismiss which were renewed after Mistick amended its *qui tam* complaint. All of the respondents asserted that the District Court lacked subject matter jurisdiction because the *qui tam* action was based upon public disclosures and the relator, Mistick, was not an original source of that information. In addition, HACP parties moved to dismiss the *qui tam* complaint for failure to state a cause of action, in that the claims were barred by the following:

1. the doctrine of res judicata;

2. the express terms of the release executed between plaintiff and HACP settling and terminating prior litigation involving the identical occurrences and subject matter as made the basis of the instant litigation;

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2. HACP parties refers to the Housing Authority of the City of Pittsburgh and its agents, Messrs. Miller and Washington.

3. the statute of limitations at 31 U.S.C. § 3731; and

4. the patent absence of a knowingly false or fraudulent claim for payment.

The District Court agreed that it lacked subject matter jurisdiction and, thus, it dismissed the complaint and the amended complaint. It did not address any of the alternative grounds for dismissal urged by HACP parties. The United States Court of Appeals for the Third Circuit affirmed. It, too, declined to reach any of the alternative grounds for affirmance raised by HACP parties.

COUNTERSTATEMENT OF THE FACTS

HACP, a federally subsidized public housing authority, owns a number of residential housing projects, including the Bedford Dwellings and Addison Terrace. It engaged the Astorino parties to serve as architects and consultants for renovations and improvements at those projects. This engagement included the development of specifications for abatement of lead paint hazards at the projects. Mistick was awarded the contract to perform the renovations and improvements, including the necessary lead based paint abatement.

The specifications for the lead based paint abatement work permitted the contractor performing this work to use one of two encapsulants, one called Glid Wall and the other called Pentagon Plastics. When Mistick submitted its bid to perform this work as general contractor, it voluntarily selected Glid Wall. The bids were accepted by HACP and contracts were awarded and executed in September 1989.

Afterwards, a multi-faceted dispute arose about the Glid Wall specification. One aspect of this dispute was that the manufacturer of Glid Wall allegedly no longer recommended or sold Glid Wall for the specific use of lead abatement, although at one time Glid Wall was used and promoted for lead abatement by the manufacturer and it still was being used for that purpose by one other public housing authority. A second facet of the controversy surrounding the Glid Wall specification was that Mistick substantially underbid the cost of performing the Glid Wall work. The bid was incorrectly calculated on the basis that one gallon covered four hundred square feet, although one gallon was specified to cover only one hundred square feet. Facing a substantial financial loss if required to apply Glid Wall in compliance with the correct coverage rate, Mistick insisted that the specification be changed to a different wall covering or that Mistick be granted other relief from its expensive bid error. But for its underpriced bid, Mistick undeniably stood ready to apply Glid Wall.

In mid-March 1990, before Mistick applied any Glid Wall, the architect changed the lead abatement specification from Glid Wall to Zomat. Therefore, instead of Glid Wall being used, the lead abatement work at the projects used Zomat. For a variety of reasons, Zomat was more expensive than Glid Wall. Consequently, the cost of the required abatement work increased by approximately $751,000. In connection with this increased cost, HACP in January 1992 submitted to HUD a change order seeking compensation for approximately $250,000 of this cost. Ultimately, HACP allegedly paid for the remainder with funds provided by HUD through the annual budget process.

The gist of this claim under the False Claims Act was that the architect issued and HACP approved the Glid Wall specification with knowledge that it was erroneous which, in turn, prevented the application of Glid Wall and required the specification to be changed to Zomat, thereby increasing the cost of the renovation work. To pay for the lead abatement work and this increased cost, HACP allegedly made false or fraudulent claims for HUD funds. These allegedly false or fraudulent requests for payment constitute a violation of the False Claims Act *according to Mistick*.[3]

The District Court held that it lacked subject matter jurisdiction under the jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A). The District Court found that there were *two* separate public disclosures of the allegations or transactions upon which the *qui tam* complaint was based. One such disclosure occurred in October of 1993 when Mistick acquired information pursuant to a request under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (FOIA). The second disclosure involved the discovery and state court filings relating to its attempt to plead fraud claims based upon the change in the lead-based paint abatement specification. The District Court noted that Mistick acknowledged that it gained some of the information upon which it based the *qui tam* action through both civil and administrative processes. The District Court held that these public disclosures triggered the jurisdictional bar. The District Court also held that Mistick could not proceed, in light of the public disclosures, because it was not an original source of the information upon which it based the *qui tam*

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3. HACP parties dispute the contention by Mistick that they made a false or fraudulent claim. The lower courts did not reach that issue.

complaint. The District Court found that Mistick neither had direct nor independent knowledge of the facts. Rather, the District Court held, Mistick admittedly became aware of the allegedly fraudulent behavior via the intervening agency, instrumentality or influence of the FOIA request and the state court proceedings.

A divided panel of the Third Circuit affirmed in all respects. The panel majority held that the FOIA request and the state court discovery constituted public disclosures within the ambit of the jurisdictional bar. With respect to the FOIA request, the majority relied upon a substantial body of law from other jurisdictions[4] and an analogous Supreme Court case,[5] as well as the plain language of the False Claims Act itself.[6] As to the discovery issue, the panel followed prior Third Circuit precedent.[7] In so holding, the majority relied

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4. *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*,186 F.3d 376, 384-85 (3d Cir. 1999), *citing United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 979 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999); *United States ex rel. Burns v. A.D. Roe Co.*, 919 F. Supp. 255, 257 (W.D. Ky. 1996); *United States ex rel. Herbert v. National Academy of Sciences*, 1992 WL 247587, at *6 (D.D.C. September 15, 1992).

5. *Mistick*, 186 F.3d at 383, *citing Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980).

6. *Mistick*, 186 F.3d at 383, *citing* 31 U.S.C. § 3730(e)(4)(A).

7. *Mistick*, 186 F.3d at 385, *citing United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991).

upon Mistick's concession, made at oral argument, that all of the essential elements of the alleged fraud were publicly disclosed in the state court action.[8] In that regard, this Honorable Court must consider the filings in state court as well as the discovery. Mistick alleged, in its motion for leave to amend its complaint, that "recent" discovery substantiated its averments, all of which were spelled out in great detail in the proposed amended complaint which was appended to the motion. The majority rejected Mistick's argument that its *qui tam* complaint was not based upon those public disclosures because it was not derived from publicly disclosed information. The majority acknowledged the Fourth Circuit decision underlying Mistick's argument,[9] but it ultimately sided with the vast majority of circuits which have addressed this question.[10] Thus, the majority held that the federal complaint was based upon the information gleaned through FOIA and the state court action because the *qui tam* averments were set forth in the public

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8. *Mistick*, 186 F.3d at 385.

9. *Id.* at 385-86, *citing United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928, 115 S. Ct. 316, 130 L. Ed. 2d 278 (1994).

10. *Mistick*, 186 F.3d. at 387, *citing United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Junior University*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1457, 143 L. Ed. 2d 543 (1999); *United States ex rel. Findley v. F.P.C. Boron Employees' Club*, 105 F.3d 675 (D.C. Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S. Ct. 1364, 122 L. Ed. 2d 742 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992).

disclosures.[11] Finally, the majority held that Mistick could not save its claim from the jurisdictional bar because it was not the original source of the publicly disclosed information.[12] The majority cited the information obtained through the FOIA request as an example of the fact that Mistick was not the original source of information essential to its complaint.[13]

The dissenting opinion, doubtlessly the blueprint for Mistick's petition, took issue with the majority's holdings on both aspects of the public disclosure issue. According to the dissent, information developed through FOIA is not publicly disclosed and neither is that which is revealed in discovery.[14] Perhaps more importantly, though, the dissent disagreed with the majority's interpretation of the based upon requirement of the jurisdictional bar.[15] The dissent would have held that the Fourth Circuit's approach was correct: based upon means derived from, not supported by or similar to.[16] Thus, the dissent would have remanded for further proceedings to determine whether the *qui tam* allegations were derived from any publicly disclosed information.[17] As such, the dissent would not have reached the original source issue.[18]

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11. *Mistick*, 186 F.3d at 387.

12. *Id.* at 389.

13. *Id.*

14. *Id.*, 186 F.3d at 390-94 (Becker, C.J., dissenting).

15. *Id.* at 394 (Becker, C.J., dissenting).

16. *Id.* at 186 F.3d at 395, 402 (Becker, C.J., dissenting).

17. *Id.* at 402-03 (Becker, C.J., dissenting).

18. *Id.* at 402 (Becker, C.J., dissenting).

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE STATUTORY INTERPRETATION QUESTIONS RAISED IN THE PETITION PRESENT NO COMPELLING REASONS TO GRANT CERTIORARI.

In its petition, Mistick seeks review of several questions of statutory interpretation arising under the False Claims Act. The Astorino parties have ably demonstrated, in their opposing brief, that there are no compelling reasons to grant certiorari, as required by Supreme Court Rule 10. Further, they have identified and addressed key misstatements contained in the petition. The HACP parties join in and adopt the brief in opposition filed on behalf of the Astorino parties.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE UNIQUE STATUS OF PRINCIPAL PARTIES MAKES THIS AN UNSUITABLE CASE TO REVIEW ANY ISSUES ARISING UNDER THE FALSE CLAIMS ACT.

Because of the unique facts of this case, it is an inappropriate vehicle to review any questions arising under the False Claims Act. Specifically, the status of HACP as a federally subsidized public housing authority makes this an unsuitable case to review. Further, the fact that Mistick already benefited from the change in the specifications for a lead based paint abatement product should preclude review.

HACP receives a substantial portion of its funding from the United States Department of Housing and Urban Development (HUD). If this Honorable Court were to grant Mistick any relief, HACP would suffer great financial hardship, thereby increasing its need for federal funding. Congress did not intend the False Claims Act to be a procedure for the federal government to take money from its left pocket to be put into its right one minus, of course, the relator's share of the recovery, *see* 31 U.S.C. § 3730(d). Yet that is exactly what would happen here if Mistick were allowed to go forward with this case. Even if HACP used non-HUD money to pay any judgment, the diversion of these funds from other places in HACP's tight budget would require increased HUD funding to enable HACP to fulfill its mission. Moreover, even if HACP successfully defended the case, the litigation costs are likely to be monstrous, putting further burdens on HACP's budget.

Even if HACP's dependence on federal funds were not enough to warrant denial of the petition, Mistick already derived substantial benefit from the change in the lead based paint abatement specification and, thus, it should not receive a windfall by being allowed to recover as a *qui tam* relator. If HACP did not obtain a change in the specification, Mistick would have sustained a devastating loss in the application of Glid Wall because of its bidding error. Thus, it is understandable why Mistick would insist upon the change in specifications. Mistick averted that loss when HUD approved the change and agreed to pay the increased cost of Mistick's revised bid using Zomat. Mistick now wants to capitalize upon the change in specifications by bringing this *qui tam* action. This Honorable Court should not condone such opportunism.

It would be contrary to the legislative intent inherent in the False Claims Act to expend federal funds to recover federal funds net, of course, of the relator's litigation costs and share of the recovery. Further, Mistick has already benefited from the change in specifications and it should not be allowed to recover. Thus, a better vehicle to decide the questions presented in the petition — if they need to be decided at all — would be in a case involving target defendants who are not dependent on federal funding for survival and a relator that has not already benefited financially from the alleged fraud.

III.

THE PETITION SHOULD BE DENIED BECAUSE, GIVEN THE UNIQUE FACTS HERE, HACP PARTIES DID NOT KNOWINGLY SUBMIT A FALSE OR FRAUDULENT CLAIM.

This is an inappropriate case to review any questions arising under the False Claims Act because, given the unique facts, HACP parties did not knowingly present a false or fraudulent claim for payment. At worst, they negligently made a mistaken or erroneous representation to HUD about Glid Wall, as held by the state court almost one year before Mistick filed this *qui tam* action. This case does not involve any request for payment for non-existent work. The work was actually performed. Nor does this case involve any fraudulent overbilling. The proper price was paid. A mistaken or erroneous representation and request for payment for completed work, however, are insufficient to state a false or fraudulent claim.

The False Claims Act imposes liability on any person who "knowingly presents" to the United States government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). The statute specifically defines "knowing" and "knowingly" as a person or entity which: has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). Therefore, negligent mistakes or errors are not actionable. *Hindo v. University of Health Sciences*, 65 F.3d 608, 613 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114, 116 S. Ct. 915, 133 L. Ed. 2d 846 (1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996), *cert. denied*, 519 U.S. 1001, 117 S. Ct. 601, 126 L. Ed. 2d 393 (1996); *Ali v. United States*, 904 F. Supp. 915, 922 (E.D. Wis. 1995).

An offense under the False Claims Act is not the intent to deceive, but a knowing presentation of a claim that is either false or fraudulent. A showing of knowing fraud is essential to state a FCA claim. *Hagood*, 81 F.3d at 1478. This means the knowing presentation of what is known to be false, that is, a lie. *Hindo*, 65 F.3d at 613; *Wang*, 975 F.2d at 1420. Therefore, any alleged act of HACP parties must involve more than a "mistake" or "negligence." Proof of one's mistakes or inabilities is not evidence that one is a cheat. *Wang*, 975 F.2d at 1421. Here, HACP parties did not make knowingly false or fraudulent statements as matter of law.

The complaint rightly asserts that, beginning in August 1986, HUD regulations required the elimination, as far as practicable, of the hazards of lead based paint poisoning at public housing projects. 24 C.F.R. §§ 35.20-35.24. In light

of these regulations, part of the renovations at the Addison and Bedford projects included the abatement of lead based paint. Astorino's specifications for this work required encapsulation, an allowable abatement method. These specifications approved the use of either a product known as Glid Wall or a product known as Pentagon Plastics. Mistick, a knowledgeable and sophisticated contractor, voluntarily selected Glid Wall. To pay for Mistick's lead abatement work, HACP intended to use HUD funds. Without question, HACP fully intended to perform lead abatement work, which, of course, had to be paid for. Therefore, any claims for HUD funds to pay for this work would not have been false or fraudulent. Claims for HUD funds would have been false or fraudulent only if HACP submitted them without any intention of having the work performed or if it overcharged for the abatement work, and used the funds for something other than lead abatement work. However, HACP's request for funding was not for non-existent or unperformed work nor was it for overpriced work, but for work that was actually undertaken and properly priced. Hence, HACP was not cheating or lying to HUD in requesting funding.

In March 1990, the specification for lead abatement work was changed by replacing Glid Wall with a product known as Zomat. The reasons for this change included, but were not limited to, the concerns surrounding the manufacturer's alleged refusal to sell Glid Wall as a lead based paint encapsulant and Mistick's bid error involving the application of Glid Wall, which error would have caused Mistick to incur a substantial loss had the Glid Wall been applied. After the specification was changed to Zomat, that product was installed by Mistick. To pay for this installation, HACP requested HUD funds. Again, the Housing Authority did not

request payment for non-existent, unperformed work, or for overpriced work, but for work that was actually undertaken and properly billed. Thus, HACP did not cheat HUD by requesting payment for something that did not exist or was not done.

HACP and its officials manage housing projects. They are not experts in lead based paint, wall coverings and/or lead abatement methods and procedures. Hence, any assent to the Glid Wall specification was clearly based upon a mistaken and erroneous interpretation of information and documentation HACP had received. Such a mistake or error does not, as a matter of law, constitute an intent to defraud the government, particularly because HACP requested funding for work that was to be and eventually was performed. Moreover, had Zomat been originally specified, HACP would have requested HUD funds to pay for its installation in any event. The mere fact that HACP may have originally mistakenly assented to the Glid Wall specification and subsequently changed the specification to Zomat before any Glid Wall was installed, does not change the fundamental fact that HACP at all times requested funds for the performance and completion of actual work for which a contractor would and did seek payment. Because HACP never requested funding for something that did not exist, for something that was not done or for something that really cost less, HACP did not cheat the government. Although HACP may have erroneously agreed to the Glid Wall specification, its request for funding to pay for work that was to be and ultimately was actually performed and completed was not a false or fraudulent claim for payment.

Because a false or fraudulent claim was not knowingly presented, as required by 31 U.S.C. § 3729, this is an

inappropriate vehicle to decide any other questions arising under the False Claims Act. If any of the questions raised in the petition need to be decided, a better case would be one involving a claim for work that was not done or for overcharges.

IV.

THE PETITION SHOULD BE DENIED BECAUSE THE *QUI TAM* CASE WAS BARRED BY THE DOCTRINE OF RES JUDICATA.

On July 16, 1991, Mistick filed suit against the HACP to recover damages allegedly arising out of the renovation work it performed at the Bedford and Addison projects. As with the present *qui tam* claims, the focus of this prior litigation was the change of the lead abatement specification from Glid Wall to Zomat and the increased cost of performance that this allegedly created. Essentially, Mistick asserted, in the state court action, that in complete disregard of the alleged fact that Glid Wall was no longer marketed or sold for lead based paint encapsulation, HACP and Astorino specified Glid Wall as the lead based paint encapsulant for the projects. Ultimately, this allegedly incorrect specification had to be changed to Zomat, thereby increasing the cost of the renovation work. The identical assertions were made in the federal complaint.

After years of litigation, the state court case was settled in May 1996. This settlement was memorialized by the execution, on August 1, 1996, of a release by HACP and Mistick, and was finalized, on August 5, 1996, by a dismissal of all claims. Thus, the Glid Wall specification issue was

fully and completely litigated to a mutually acceptable resolution. This should preclude the present claims under the doctrine of res judicata.

Res judicata, or claim preclusion, preserves the finality of concluded or resolved litigation. *Carbonaro v. Johns/ Manville Corp.*, 526 F. Supp. 260, 262 (E.D. Pa. 1991). Under the doctrine of res judicata, a resolution of a prior suit bars a second suit involving the same parties or their privies based upon the same subject matter or occurrences. *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552, 557 n.5 (1979). Res judicata is "designed to draw a line between a meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." *Purter v. Heckler*, 771 F.2d 682, 689, 690 (3d Cir. 1985).

Res judicata will be applied against a plaintiff even though the plaintiff has proposed different theories of liability in the subsequent action. *Coggins v. Carpenter*, 468 F. Supp. 270, 280 (E.D. Pa. 1979). This doctrine not only bars the reassertion of a matter which was actually offered and received in the initial proceeding, "but also as to every ground of recovery or defense which might have been presented." *Ley v. Boron Oil Co.*, 454 F. Supp. 448, 449 (W.D. Pa. 1978); *Coggins*, 468 F. Supp. at 280. A judgment or decree, though entered by consent or agreement of the parties, is res judicata to the same extent as if entered after contest. *Allegheny International, Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1429 (3d Cir. 1994); *Keystone Building Corp. v. Lincoln Savings & Loan Association*, 468 Pa. 85, 90 n.6, 360 A.2d 191, 194 n.6 (1976). Thus, a dismissal with prejudice after a settlement constitutes an adjudication of

the merits as fully and completely as if the order had been entered after trial. *Gambocz v. Welencsics*, 468 F.2d 837, 840 (3d Cir. 1972).

United States ex rel. Paul v. Parsons, Brinkerhoff, Quadė & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), is dispositive of the res judicata issue. In that case, an employee of a subcontractor brought a *qui tam* action alleging that the subcontractor and its joint venture submitted fraudulent claims for payment to the government. Previously, the employee had brought a state court suit against the subcontractor alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. In granting a motion to dismiss, the district court held that the False Claims Act case was barred under the law of res judicata because the employee could have raised these claims in the prior state court action. *Id.* at 373-75. The court noted that because the False Claims Act states that an action arising under it may be brought in federal court, there exists concurrent jurisdiction between state and federal courts. *Id.*; 31 U.S.C. § 3732(a). The following passage succinctly summarizes the court's holding:

> In this case, the complaint arose from the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in these activities lead to his discharge. Paul alleges that PBQ and D and BMI participated with PB-KBB in the illegal acts. Although the

> complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

860 F. Supp. at 374.

This case is no different than *United States ex rel. Paul.* Both Mistick's prior state court action and its present *qui tam* action arose from the same operative facts, and both claims could have been adjudicated in the state court in one convenient proceeding. Nothing prevented Mistick from bringing all claims arising out of the Glid Wall specification in the state court. It certainly had ample time to bring the claims because Mistick alleges that it discovered the fraud in 1990 yet the state court action did not end until 1996. It simply chose not to do so. Instead, while the state court action was winding down, it secretly filed the *qui tam* case in federal court.

Because the earlier state court litigation has been resolved and dismissed, the principles of res judicata bar the current False Claims Act suit and Mistick's attempt to get a second bite at the apple. Accordingly, a better case to decide the issues raised by the petition — if they need to be addressed — would be a case in which the relator did not previously sue the defendants on similar grounds.

V.

THE PETITION SHOULD BE DENIED BECAUSE THE TERMS OF THE HACP/MISTICK RELEASE BAR THE PRESENT CLAIMS.

The prior civil litigation brought by Mistick against HACP in state court was settled in May 1996. On August 1, 1996, Mistick and HACP executed a settlement agreement and release of claims terminating the litigation. This release bars the present claim.

In pertinent part, this release provides that in return for HACP's payment of a certain sum, Mistick released and forever discharged HACP and each of its directors and officers, among others,

> of and from *any and all liability*, responsibility and/or obligation *for any and all causes of action*, claims or demands for damages, losses, costs, expenses, compensation, proceeds, fees and/or monies, known and unknown, which Mistick PBT has made, claims to have and/or may hereafter have or claim to have in the lawsuit entitled Mistick PBT d/b/a Mistick Construction, formerly known as Mistick Incorporated v. The Housing Authority of the City of Pittsburgh, No. 91-12543 of the Court of Common Pleas of Allegheny County, Commonwealth of Pennsylvania, including particularly, *without limitation*, any and all sums owed or claimed to be owed to Mistick PBT for losses or damages incurred or claimed to have been incurred by Mistick PBT *arising from the performance of the Bedford Dwellings*

> *remodeling and reconstruction contract . . . and/ or the performance of the Addison Terrace remodeling and reconstruction contract.*

(Emphasis added). This language expressly and unambiguously includes Mistick's present claims, and requires them to be dismissed.

There is a strong judicial policy in favor of parties voluntarily settling lawsuits. Therefore, voluntary settlements of civil litigation are specifically enforceable and broadly interpreted. *Pennwalt Corp. v. Plow, Inc.*, 676 F.2d 77, 80 (3d Cir. 1982). A signed release is binding upon the parties unless executed and procured by fraud, duress, accident or mutual mistake. *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Reed v. Smithkline Beckman Corp.*, 569 F. Supp. 672 (E.D. Pa. 1983). Importantly, a release is binding even as to claims unknown at the time the release was executed if this was the intended scope of the release. If the parties manifest an intent to settle all claims, a release will be given full effect even as to unknown claims. *Total Containment, Inc. v. Environ Products, Inc.*, 921 F. Supp. 1355, 1415 (E.D. Pa. 1995). *See also Three Rivers*, 522 F.2d at 896; *Shlensky v. Dorsey*, 574 F.2d 131, 144 (3d Cir. 1978).[19]

19. Undeniably, when the civil litigation was settled in May 1996, Mistick had full and complete knowledge of its *qui tam* claims. Indeed, its federal complaint was filed under seal seven months earlier in November 1995. Mistick secreted this action from HACP during settlement negotiations. Accordingly, HACP parties had no knowledge of the federal complaint until it was served in August 1996, within a matter of days after the state court case ended. Although Mistick knew of the *qui tam* action when the release settling the state court action was executed, Mistick reserved no rights relating to its *qui tam* claims.

The focus of the prior civil action filed in state court was the Glid Wall specification, its change to Zomat and the alleged increased costs that this caused. The settlement of this civil claim was consummated when Mistick and HACP executed a release of claims. According to the unequivocal and unambiguous terms of the release, Mistick forever discharged HACP from any and all liability for any and all causes of action arising out of the remodeling and reconstruction work at the Bedford and Addison projects. Mistick reserved no rights to litigate any other claims arising out of this work. Thus, the claims made the basis of this litigation have been expressly released. This release must be enforced by ending this litigation.

Mistick may argue that the release does not bar this litigation because, as the private relator, Mistick cannot settle the *qui tam* action without the consent of the United States and the court. Such a blithe assertion utterly miscomprehends the circumstances surrounding HACP's argument based upon the release. The motion to dismiss was not based upon any settlement of an existing *qui tam* action to which the government, admittedly, must consent. 31 U.S.C. § 3730(c)(2)(B). Instead, HACP relies upon a release executed by a private party, the relator, who is, in reality, the only real party in interest now that the government declined to intervene.

The reality that Mistick cannot escape is the following:

- The United States declined to intervene in the instant litigation. By definition, Mistick is prosecuting this action in its own name. The release, however, bars Mistick from prosecuting any other actions against HACP arising out of the renovation work at Bedford and Addison.

- If this action is successful, the False Claims Act entitles Mistick to recover substantial proceeds, fees, and expenses. *See* 31 U.S.C. § 3730(d)(2). In its amended complaint, Mistick prays for such a recovery in its own name. But for this financial incentive, Mistick would not be prosecuting this *qui tam* action. The release, however, bars Mistick from recovering any other proceeds, fees and expenses as a result of the Bedford and Addison projects.

- Nothing prevented Mistick from obtaining the consent of the United States and the court before agreeing to settle with HACP in May 1996. Instead of obtaining the consent of the United States and the court as it should have, Mistick, on the one hand, secreted the settlement from the United States and the District Court and, on the other, concealed the *qui tam* action from HACP. The motives for doing so are clear. Mistick desired to make another recovery from HACP. The HACP/Mistick release, however, prohibits this.

- The release was executed approximately three weeks after the United States declined to intervene and the District Court unsealed the record. During these three weeks, Mistick easily could have obtained the required consent from the United States and the court, assuming that the consent of the United States was still required after the United States declined to intervene. But note the consent of the United States is required only until the United States declines to intervene. *United States ex rel. Killingsworth v. Northrop Corporation*, 25 F.3d

715, 722-23 (9th Cir. 1994); *United States v. Northrop Corp.*, 59 F.3d 953, 959 (9th Cir. 1995). This Mistick did not do. Additionally, after the United States declined to intervene, Mistick easily could have informed HACP of the *qui tam* action before consummating the settlement. This Mistick also did not do. Instead, Mistick continued to hide this action from HACP until the federal complaint was served several days after the release was executed. Regardless of what Mistick did or did not do, the fundamental point remains that the release expressly prohibits Mistick from making any additional recovery from HACP as a result of the Bedford and Addison renovations.

- In a showing of good faith and fair dealing with HACP in light of the settlement, nothing would prevent Mistick from withdrawing as the relator in the instant litigation. Indeed, nothing compels Mistick to prosecute the present *qui tam* action. Mistick's only reason for doing so is to recover the proceeds, fees and expenses to which it would be entitled if its efforts are successful. The release, however, prohibits such a recovery.

The release requires Mistick to be dismissed as the relator in this action. No provision of the False Claims Act prohibits Mistick's dismissal as the relator. Alternatively, the clear and unambiguous terms of the release prohibit Mistick from recovering any additional proceeds, fees and expenses from the HACP arising out of the Bedford and Addison renovation projects. In this regard, the rationale of *United States ex rel. Dunleavy*, 123 F.3d 734 (3d Cir. 1997), is enlightening. In that case, the Third Circuit held that there

was a justiciable case or controversy despite the government's settlement of the False Claims Act case because the relator had a separate interest in recovery. 123 F.3d at 738-39. Here, as in that case, the government did not intervene. However, unlike *Dunleavy*, Mistick renounced its right to further recovery from HACP by execution of the release. Therefore, this case is inappropriate to decide any questions arising under the False Claims Act. A better case would be one in which the relator did not settle with the defendants before filing in federal court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Astorino parties' brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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